Supreme Court, U.S.
FILED

94-2085 JUN 19 1995

OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT
OF THE UNITED STATES

October Term, 1994

Charles A. Stuckey and Corine Stuckey,
Petitioners,

vs.

Jack Kemp, Secretary of the United States Department of Housing and Urban Development, et al.,
Respondents.

Petition for a Writ of Certiorari
To The United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Alvin Hinkle
Counsel of Record
CAROLINA REGIONAL LEGAL SERVICES CORPORATION
279 West Evans Street
Florence, SC 29503
(803)667-1896
Attorney for Petitioners

84 pp

QUESTION PRESENTED

I. IN EXERCISING JUDICIAL REVIEW, MAY A UNITED STATES COURT OF APPEALS DEPART SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CLEARLY DISREGARD THE RELEVANT FACTS ON THE RECORD THAT ESTABLISH THAT AN AGENCY'S DECISION WAS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, AND NOT IN ACCORDANCE WITH LAW?

PARTIES TO THE PROCEEDING

Charles A. Stuckey; Corine Stuckey; Jack Kemp, Secretary of the United States Department of Housing and Urban Development; and the United States Department of Housing and Urban Development were the only parties to this action in the United States Court of Appeals for the Fourth Circuit.

The above parties are a part of a third party action. The original action involved Banc One Mortgage Corporation as plaintiff and the Stuckeys as defendants. Banc One did not participate in the District Court action or the Court of Appeals action.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISION INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 28

APPENDIX . . . . . App. 1

United States District Court Opinion . . . . . App. 1

United States Court of Appeals Opinion . . . . . App. 12

United States Court of Appeals Petition for Rehearing . . App. 32

TABLE OF AUTHORITIES

Page

CASES

Anderson v. HUD, 701 F.2d 112, 115 (10th Cir. 1983) 14

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 13

Cronkhite v. Kemp, 741 F. Supp. 828 (1990) 22

Motor Vehicle Mfg. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983) 13

STATUTES

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1331 2

5 U.S.C.A. @ 706(2)(A)(1977) 10

12 U.S.C.A. @ 1715u (1989) . . 5, 15, 23

24 C.F.R. § 203.650 . . . . . 5, 15, 23

ADDITIONAL AUTHORITIES

Sup. Ct. R. 13 3

HUD HANDBOOK 4330.2 REV-1, 2-10, B, 4(a) 26

TABLE OF AUTHORITIES

Page

ADDITIONAL AUTHORITIES

HUD HANDBOOK 430.2 REV-1, 2-10, B, 7 15

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

CHARLES A. STUCKEY and CORINE STUCKEY,
Petitioners,

vs.

JACK KEMP, Secretary of the United States Department of Housing and Urban Development, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

Charles A. Stuckey and Corine Stuckey, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

DECISIONS BELOW

The judgment of the United States District Court for the District of South Carolina is unreported and is reprinted in the Appendix at page App. 1. The District Court's opinion was read into the record and no written opinion was

separately issued. The opinion of the United States Court of Appeals is unreported and is reprinted in the Appendix at page App. 12.

JURISDICTION

The jurisdiction of the United States District Court for the District of South Carolina was based upon 28 U.S.C. § 1331 (federal question). The final judgment of the District Court was filed September 27, 1993. Charles A. Stuckey and Corine Stuckey filed a Notice of Appeal on November 24, 1993. The Court of Appeals for the Fourth Circuit issued its decision affirming the District Court on January 25, 1995. The Stuckeys filed a timely Petition for Rehearing on March 8, 1995, which is reprinted in the Appendix at page App. 32. The Petition for Rehearing was denied March 20, 1995. The Court of Appeals filed a mandate on

March 27, 1995 making effective its judgment of January 25, 1995. The instant Petition for Certiorari is timely pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is based upon the final decision of the United States Court of Appeals for the Fourth Circuit and is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The United States Department of Housing and Urban Development ("HUD"), is required to accept assignment of a mortgage in order to avoid foreclosure if the following conditions are met:

1) the mortgagee has informed the mortgagor that it intends to foreclose the mortgage;
2) at least three full monthly installments due on the mortgage are unpaid after application of any partial

payments which may have been accepted but not yet applied to the mortgage account;

3) the property is the mortgagor's principal place of residence;

4) the mortgagor does not own other property subject to a mortgage insured or held by the Secretary;

5) the mortgagor's default has been caused by circumstances beyond the mortgagor's control which render the mortgagor unable to correct the delinquency within a reasonable time or make full mortgage payments; and

6) there is a reasonable prospect that the mortgagor will be able to resume full mortgage payments after a period of

reduced or suspended payments not exceeding 36 months and will be able to pay the mortgage in full by its maturity date extended, if necessary, by up to ten years.[1] 12 U.S.C.A. @ 1715u (1989), 24 C.F.R. § 203.650.

STATEMENT OF THE CASE

A. Procedural History

This is a case about a family that is about to lose possession of their federally insured home because of a decision which has no basis in either law or fact.

In 1983, Charles and Corine Stuckey exercised one of the treasured American

---

[1] Conditions five and six are at issue in this case. However, the Court of Appeals affirmed based on the sixth factor and did not make a determination regarding the issues raised by the fifth factor.

dreams by purchasing their own home. The purchase was secured by a mortgage, endorsed and insured by HUD. The mortgage was originally held by Carolina Mortgage Corporation and subsequently assigned to Banc One.

The American dream went sour for the Stuckeys and they defaulted on their mortgage.

Banc One favorably recommended the Stuckeys for assistance in the HUD assignment program. HUD rejected the Stuckeys' request for acceptance into the assignment program claiming that they did not meet the established criteria for the program. HUD authorized Banc One to file a foreclosure action in the Court of Common Pleas.

In addition to filing an answer to the foreclosure action, the Stuckeys filed a third-party complaint against HUD

seeking relief for the inappropriate denial of their application for assistance under the HUD assignment program. HUD removed the case to the United States District Court for the District of South Carolina.

Subsequent to the removal, the Stuckeys filed a Chapter 13 petition in the United States Bankruptcy Court, dismissing the third-party complaint against HUD without prejudice. The foreclosure action was stayed during the pendency of the bankruptcy.

While the Stuckeys continued to make monthly mortgage payments under the bankruptcy plan, Banc One moved to lift the automatic stay because unforeseen circumstances prevented the Stuckeys from making a large lump sum payment by a certain deadline. Banc One was allowed to proceed with the foreclosure action.

The Special Master in the Court of Common Pleas recommended judgment in favor of Banc One. Exceptions were filed to the Special Master's report. Thereafter, Banc One consented to the Stuckeys refilling of the third-party action against HUD. The third-party claim was removed to the United States District Court for the District of South Carolina.

HUD then moved for summary judgment or to dismiss. Summary judgment was granted.

B. Decisions Below

The District Court reviewed the administrative record and determined that HUD's decision relating to criterion six was a reasoned one not to be overturned on judicial review.[2] The court concluded

---

[2] The District Court found that criterion five had not been met by the Stuckeys. Since the record clearly establishes that the Stuckeys met

that by primarily looking to Mr. Stuckey's employment record and what he was doing at the time of the HUD review, that criterion six had not been met. The District Court concluded that the Stuckeys did not have a reasonable prospect for resuming full mortgage payments, even with a ten-year extension. The Court of Appeals agreed.

REASONS FOR GRANTING THE PETITION

I. SINCE JUDICIAL REVIEW MANDATES THAT THE REVIEWING COURT PERFORM AN INDEPENDENT REVIEW OF THE RECORD IN DETERMINING WHETHER THE AGENCY'S DECISION WAS NOT ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW, THE COURT'S

---

criterion five, having defaulted on their mortgage because of a circumstance beyond their control, the District Court's reasoning was arbitrary and capricious.

FAILURE TO PERFORM SUCH A REVIEW CONSTITUTES A DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS.

This matter found its way to the courts by way of judicial review. The Administrative Procedures Act governs the provisions for judicial review. 5 U.S.C.A. @ 706(2)(A)(1977). The Administrative Procedures Act mandates that an agency's decision found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" shall be set aside. *Id.*

HUD's decision denying the Stuckeys acceptance into the assignment program should be overturned because the record clearly establishes that:

1) the Stuckeys were short only $133.93 (one hundred thirty

three dollars and 93/100ths) from presently paying their full mortgage payment and other monthly obligations;

2) HUD required the Stuckeys to establish a present ability to resume full mortgage payments instead of a future ability as the regulations mandate;

3) with the benefit of temporary reduced or suspended payments, the Stuckeys would have been able to resume full mortgage payments within 36 months;

4) in 24 months, $193.00 (one hundred ninety three dollars and 00/100ths) would have been available to use for the mortgage payment, definitely exceeding the shortage of $133.93 (one hundred thirty

three dollars and 93/100ths);

5) the Supplemental Security Income payment to the Stuckeys' minor child was relevant regarding its use to reduce monthly expenses, freeing other funds for the mortgage payment;

6) alternatively, within the 36 months specified by criterion six, the minor child receiving the SSI would have reached majority and could have contributed a portion of those funds to her shelter; and

7) the administrative record clearly establishes that the Stuckeys did have a reasonable prospect of obtaining just $133.93 (one hundred thirty three dollars and 93/100ths) in order to resume their full

mortgage payment within 36 months of acceptance into the assignment program.

A. In order for an appellate court to appropriately perform judicial review, the court must independently examine the facts and confirm that the challenged decision is supported by the facts.

The reviewing court is charged with the task of considering whether the decision was based on a determination of the relevant factors and free from a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

While the reviewing court may not substitute its judgment for that of the agency, an agency's rule is arbitrary if the agency entirely failed to consider an important aspect of the problem. *Motor*

Vehicle Mfg. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983).

Although the Court of Appeals possessed no power to substitute its judgment for that of HUD, the court had a responsibility to independently review the record and make sure that the facts supporting HUD's actions were "adequately adduced and rationally applied." *Anderson v. HUD*, 701 F.2d 112, 115 (10th Cir. 1983). Anything less than an independent review of the record constitutes essentially a non-review and a departure from the usual course of proceedings regarding judicial review.

B. HUD never evaluated the Stuckeys' request based on a calculation of temporary or reduced mortgage payments in order to determine whether the Stuckeys could resume full mortgage payments in the time

period specified by criterion six.

HUD is required to accept assignment if "there is a reasonable prospect that the mortgagor will be able to resume full mortgage payments after a period of reduced or suspended payments not exceeding 36 months and will be able to pay the mortgage in full by its maturity date extended, if necessary, by up to ten years." 12 U.S.C.A. @ 1715u (1989), 24 C.F.R. 203.650.

The HUD guidelines require field staff to presume that the mortgagor accepted under the assignment program will receive 36 months of reduced or suspended payments at a level consistent with the mortgagor's ability to pay. HUD HANDBOOK 430.2 REV-1, 2-10, B, 7. This requirement means that the assignment program is not a charity program. The Stuckeys realize that they are required

to repay every penny of the money borrowed with interest.

The Stuckeys reported a net monthly income of $1,220.44 (one thousand two hundred twenty dollars and 44/100ths). The full monthly mortgage obligation and other monthly payments totalled $1,354.37 (one thousand three hundred fifty four dollars and 37/100ths). The Stuckeys were short only $133.93 (one hundred thirty three dollars and 93/100ths) from making their full monthly obligations.

Although the Court of Appeals indicated that it conducted an independent review of the record, the facts in the record indicate otherwise. The Stuckeys met the literal language of criterion six meaning that with reduced or suspended payments not exceeding 36 months, the Stuckeys would have been able to resume full mortgage payments and pay

the mortgage in full by its maturity date. The court concluded, based on Mr. Stuckey's sporadic employment at the time of the review and Mrs. Stuckey's limited income, HUD was correct in concluding that the Stuckeys had no reasonable prospect for resuming full mortgage payments after a temporary period of reduced payments.

A thorough and independent review of the record indicates the following relevant facts relating to criterion six[3]:

(1) HUD never considered the fact that the Stuckeys were short just $133.93 (one hundred thirty three dollars and 93/100) from making their full

---

[3] Other relevant facts relating to criterion six are discussed later in this petition.

mortgage payment and covering all of their other monthly obligations;

(2) HUD never considered how a reduced or a suspended mortgage payment would have enabled the Stuckeys to resume full mortgage payments at least by the 36th month after the assignment was granted, as criterion six mandates; and

(3) HUD required the Stuckeys to establish a present ability to resume full mortgage payments, instead of establishing a future ability to pay, as the regulations mandate.

Any independent review of the record illuminates these errors. These facts are relevant as to whether HUD made a clear error of judgment in determining

that the Stuckeys had no reasonable prospect for resuming full mortgage payments after a period of reduced or suspended payments.

The Court of Appeals, in affirming HUD's actions, highlights the fact that HUD sent a preliminary letter to the Stuckeys noting that they did not have sufficient income to meet their mortgage payments and other monthly obligations. Since the assignment program requires that a mortgagor must have missed three (3) full mortgage payments in order to be eligible for the assignment program, it is not uncommon for a mortgagor requesting an assignment to be unable to meet his or her mortgage payments and other monthly obligations.

HUD subsequently requested additional information from the Stuckeys, specifically documenting any anticipated

increase in income or earnings.

The Stuckeys submitted additional information, specifically a letter evidencing an award of supplemental security income from the Social Security Administration and HUD's own Request for Financial Information Form 92068F among other documents.

HUD dismissed these documents as non-persuasive. HUD sent another letter to the Stuckeys concluding that no written proof was presented to show that Mr. Stuckey anticipated receiving an increase in income or earnings and that the supplemental security benefits were not for household income expenses. HUD stated again in that same letter that the Stuckeys did not have legally useable income to assist them in meeting their full mortgage payment and their other monthly obligations.

The record clearly establishes that the Stuckeys had a reasonable prospect for resuming full mortgage payments absent consideration of Mr. Stuckey's employment situation and Mrs. Stuckey's income, which was not so limited as HUD suggested. Simple mathematics show that if the Stuckeys' mortgage was temporarily reduced by $135.00 (one hundred thirty five dollars and 00/100ths), they would have been able to pay the mortgage and their other monthly obligations. In fact, in 24 months, the Stuckeys' car loan of $193.00 (one hundred ninety three dollars and 00/100ths) would have been available to use for the full mortgage payment of $539.00 (five hundred thirty nine dollars and 00/100ths), equalling a reasonable prospect to resume full mortgage payments after a temporary period of reduced payments well within

the 36 month period as criterion six mandates.

The administrative record is clear that HUD did not consider anything less than the Stuckeys paying a full mortgage payment of $539.00 (five hundred thirty nine dollars and 00/100ths) when considering whether the Stuckeys qualified for the assignment program. At no point in the record did HUD ever consider suspending or reducing the Stuckeys mortgage in order to temporarily assist them in order for them to resume full mortgage payments at least by the 36th month as criterion six mandates.

HUD regulations provide that in evaluating the reasonable prospect criterion, **future ability to pay is the appropriate key**. *Cronkhite v. Kemp*, 741 F. Supp. 828 (1990). Here, the record clearly shows that HUD required the

Stuckeys to demonstrate that they could pay the full mortgage payment plus their other monthly obligations in order to qualify for the assignment program.

This very requirement by HUD is contrary to the entire purpose of the assignment program: assisting those homeowners who have gotten into trouble regarding their ability to presently pay their mortgage and other obligations.

The clear language of criterion six states that HUD is required to accept assignment if "there is a reasonable prospect that the mortgagor will be able to resume full mortgage payments after a period of reduced or suspended payments not exceeding 36 months and will be able to pay the mortgage in full by its maturity date extended, if necessary, by up to ten years." 12 U.S.C.A. @ 1715u (1989), 24 C.F.R. § 203.650. The record

establishes that HUD required the Stuckeys to demonstrate a present ability to resume full mortgage payments. Such action by HUD was clearly arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with law and such be overturned as a clear error of judgment.

C. HUD's own Request for Financial Information Form 92068F clearly showed that the Stuckeys' car loan would have been paid off in 24 months, equalling a reasonable prospect for resuming the full mortgage payment within 36 months.

Form 92068F is a part of the administrative record. The information regarding the car loan was on the form and it is a relevant factor that should have been considered by HUD regarding the reasonable prospect criterion.

In a 24 month period, $193.00 (one hundred ninety three dollars and 00/100ths) would have been available to pay the mortgage. In order for HUD's decision to be valid and rationally adduced, there must not have been any reasonable possibility for the Stuckeys to ever resume full mortgage payments within a 36 month period.

The record clearly established that the Stuckeys were short just $133.93 (one hundred thirty three dollars and 93/100ths) from making all of their monthly obligations. The availability of $193.00 (one hundred ninety three dollars and 00/100ths) in a 24 month period clearly equals a reasonable prospect because the Stuckeys would have been able to resume full mortgage payments by the 36th month after the assignment was accepted as required by criterion six.

HUD's refusal to acknowledge this critical information regarding the Stuckeys' qualification for the assignment program is a clear error of judgment on the agency's part and should be overturned.

D. HUD's refusal to consider the Supplemental Security Income (SSI) payment to the Stuckeys' minor child as it related to the reduction of monthly expenses was arbitrary and capricious regarding the reasonable prospect criterion.

HUD regulations provide that field staff must consider benefits that reduce expenses. HUD HANDBOOK 4330.2 REV-1, 2-10, B, 4(a). The Stuckeys' minor child was receiving $386.00 (three hundred eighty six dollars and 00/100ths) in SSI. HUD concluded that these funds could not

be legally usable for the mortgage payment. HUD erred by not considering how the SSI could have been used to reduce monthly expenses such as food and clothing for the child. This would allow other funds to be used for the mortgage payment.

In addition, HUD arbitrarily failed to consider that while the SSI was for the benefit of the minor child, the child would have reached the age of majority by the 36th month. Since the record established that the child was 15 years old at the time of the assignment request, the SSI should have been counted as a reasonable prospect for additional household income since the child could legally contribute a portion of those funds to her shelter after reaching the age of majority.

This court is the last resort for

the Stuckey family. A clear review of the record and applicable law reveals no rational factual or legal basis for HUD's decision and the courts' review of that decision. Without intervention of this honorable court, the Stuckeys will suffer irreparable harm despite their eligibility for assistance. This court has the power to see that this does not happen.

Conclusion

Since the United States Court of Appeals for the Fourth Circuit disregarded the relevant facts on the record and applicable law in reviewing the actions of HUD and the District Court's review of those actions, this constituted a departure from the usual course of judicial proceeding. Based on these reasons, the Petition for a Writ of Certiorari should be granted.

DATED June 18, 1995.

Respectfully submitted,

Alvin Hinkle
Counsel of Record
CAROLINA REGIONAL LEGAL
SERVICES CORPORATION
279 West Evans Street
Florence, SC 29503
803-667-1896
Attorney for Petitioners

United States District Court
District of South Carolina
Florence Division

Civil Action No. 4:92-962

Argued and Decided September 27, 1993

BANC ONE MORTGAGE CORPORATION,
Plaintiff,

vs.

CHARLES A. STUCKEY, AND CORINE STUCKEY,
Defendants/Third Party Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Third Party Defendants.

Before: HOUCK, District Judge.[1]

The Court: This action was instituted originally as a foreclosure action in which the plaintiff, Bank One Mortgage Corporation, brought suit in the

---

[1] The transcript of the proceedings has been omitted and only the court's order is reprinted here.

Common Pleas Court of Florence County, State of South Carolina, against Charles A. Stuckey and Corrine Stuckey, Defendant, to foreclose the mortgage described in the complaint.

Subsequently, the aforenamed defendants filed a third party complaint against the United States Department of Housing and Urban Development, and the Secretary of that department. Herein after referred to as HUD.

After that third party complaint was filed, the HUD defendants moved the case to this court. The matter now comes on before the court on motion of the HUD defendants for a dismissal or a summary judgment as to the claim filed against it by the defendants in their third party complaint.

Our review of the action of HUD in its denial of the request for assignment

is governed by the Administrative Procedures Act.

The Fourth Circuit has stated in the case of Duke Power Company against U.S. Nuclear Regulatory Commission, a 1985 case, reported at 778 F. 2d page 386, 389, that such a review requires a reviewing court to set aside agency action if it appears in the record that such action is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

Under this standard, however, a reviewing court is not to substitute its judgment for that of the agency, and the court is to show a proper deference to the expertise of the agency. The court should make a searching and careful inquiry of the record in order to ascertain whether the agency decision was based on a consideration of the relevant

factors and whether there has been a clear error of judgment.

The federal regulation involved in this inquiry is contained in 24 C.F.R. Section 203.650, which is titled Assignment of Mortgages. In sub-paragraph A of that section the following statement is made.

The Secretary will accept assignment of mortgages insured under this part in order to avoid foreclosure when the following conditions are met.

And thereunder are listed six conditions. The government does not contend that the first four were not met, but it does contend that conditions five and six were not met. They read as follows.

Five. The mortgagor's default has been caused by circumstances beyond the mortgagor's control, which render the

mortgagor unable to correct the delinquency within a reasonable time or make full mortgage payments.

Six. There is a reasonable prospect that the mortgagor will be able to resume full mortgage payments after a period of reduced or suspended payments not exceeding 36 months, and will be able to pay the mortgage in full by its maturity date extended, if necessary, by up to ten years.

As the Fourth Circuit Court of Appeals requires in Duke Power Company. I have conducted a searching and careful inquiry into the whole record in this case. It appears clear and the defendant do not deny the cause of Mr. Stuckey's financial problems and the alleged reason for the Stuckeys not being able to make the payments due under the mortgage was the termination of his employment with

the Florence County Sheriff's Department. The record clearly shows and it's admitted by the Defendants that that termination was a direct result of Mr. Stuckey's excessive consumption of alcohol.

The conclusion by HUD that the default was caused -- the conclusion by HUD that the fifth condition quoted above was not met was supported by the record. I therefore conclude that such a decision was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

I think that people may differ as to whether or not the circumstances of Mr. Stuckey's employment met or failed to meet the conditions of subsection 5, but I don't think anyone can say that the decision made by HUD in regard thereto was subject to reversal by this court. I

think it's supported by the evidence. I think it's a sound, reasoned decision and not one this court should disturb.

The other condition that HUD found had not been met was the one contained in Subsection 6, also quoted above.

In reviewing the record and considering whether or not HUD's decision in that regard was a reasoned one and one that should not be overturned by this court. We look primarily to the defendant, Mr. Stuckey's employment record, what he was doing at that time and the prospects that he had to gain employment such that the terms of Subsection 6 could be met.

There is nothing in this record, the administrative record, that would support a conclusion that the conditions contained in paragraph 6 had been met.

We therefore conclude that the

decision of HUD that the defendants did not meet the condition contained in Sub-paragraph 6 of Section 203.650 Sub-paragraph A, is well founded, reasonable and not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

After making a thorough searching and careful review of the record compiled by HUD in this matter. We therefore conclude that the government is entitled to summary judgment and is entitled to have the first cause of action asserted against it in the third party complaint dismissed and judgment entered for HUD thereon, that cause of action being the one that claims error on the part of HUD in failing to accept assignment of the mortgage in question.

The second cause of action asserts that HUD has somehow failed to perform

adequately its oversight requirements of the lending institution servicing the mortgage. I find it somewhat difficult to understand fully what that contention consists of.

Mr. Hinkle has gone through some of the regulations that permit HUD to monitor the policies and acts of the servicing bank. I see nothing in the regulations, however, that requires any action by HUD in that regard. At best, the regulations give HUD certain discretion. As the United States has shown in their brief, that does not create a right of appeal by the Stuckeys to this court, concerning the oversight responsibilities of HUD. A failure, an alleged failure to perform those oversight responsibilities is not appealable to this court, and cannot be reviewed by this court under the

Administrative Procedures Act.

The Government's motion in regard to that cause of action is likewise granted, and that cause of action is dismissed and the clerk instructed to enter summary judgment for the defendant thereon, the third party defendant thereon.

In substance, what we have done is granted the government's motion to dismiss and for the summary judgment on the entire third party complaint and instructed the clerk to enter judgment for the government, the defendant HUD, in those causes of action and dismiss the same.

That being the case, there is no federal jurisdiction left in this case, and the remaining part of the case which involves the foreclosure action, and the parties as originally shown in the action instituted in the Common Pleas Court of

the County of Florence, State of South Carolina, are the only parties remaining.

There being no federal jurisdiction in that particular aspect of the case, that case, Bank One Mortgage Corporation, plaintiff against Charles A. Stuckey and Corrine Stuckey, defendants, is remanded to the court from whence it was removed so that that court can proceed to assume such jurisdiction as it has in that case. That disposing of the motions now before the court, the aforementioned order is entered on the records of this court, and it is so ordered.

Okay. Thank you very much. We'll be in recess until two-thirty.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Argued: December 8, 1994

Decided: January 25, 1995

Docket No. 93-2519

BANC ONE MORTGAGE CORPORATION,
Plaintiff,

vs.

CHARLES A. STUCKEY; CORINE STUCKEY,
Defendants-Third Party Plaintiffs - Appellants,

vs.

JACK KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT,
Third Party Defendants - Appellees.

Before: HALL and WILLIAMS, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Appeal from the United States District Court for the District of South Carolina, at Florence. C. Weston Houck, Chief District Judge. (CA-92-962-4-2)

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Alvin Hinkle, CAROLINA REGIONAL LEGAL SERVICES CORPORATION, Florence, South Carolina, for Appellants. John Berkley Grimball, II, Assistant United States Attorney, Columbia, South Carolina for Appellees. ON BRIEF: J. Preston Strom, Jr., United States Attorney, Columbia, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Charles and Corine Stuckey (the Stuckeys) appeal a decision of the United States District Court for the District of South Carolina upholding an informal

adjudication of the United States Department of Housing and Urban Development (HUD) and granting summary judgment in favor of HUD. For the reasons discussed below, we affirm the judgement of the district court sustaining the decision of HUD.

I.

On December 14, 1983, the Stuckeys purchased a home secured by financing from Carolina Mortgage Corporation (Carolina Mortgage). At the time, Carolina Mortgage was a HUD approved direct endorsement lender authorized to apply to HUD for insurance of its mortgages, pursuant to § 203 of the National Housing Act, 12 U.S.C. § 1709. Upon application of Carolina Mortgage for insurance, HUD endorsed the Stuckeys' mortgage and agreed to insure the loan. Subsequently, the mortgage was assigned

to and is now held by Banc One Mortgage Corporation (Banc One).

The Stuckeys defaulted on their mortgage in May of 1989. Because some mortgages insured by HUD may be assigned to HUD to avoid foreclosure, the Stuckeys requested that HUD accept assignment of their mortgage. On January 31, 1990, HUD determined that the Stuckeys did not meet the eligibility criteria and declined to accept assignment.

On February 23, 1990, following HUD's decision, Banc One filed a foreclosure action in the South Carolina Court of Common Pleas for Florence County. In response, the Stuckeys filed an answer and counterclaim in addition to a third-party complaint against HUD. On April 20, 1990, HUD removed the case to the United States District Court for the District of South Carolina. The Stuckeys

then filed a Chapter 13 petition in the United States Bankruptcy Court. Thereafter, on October 10, 1990, the Stuckeys voluntarily dismissed without prejudice the third-party complaint against HUD and the case was remanded to the state court. On November 27, 1990, the bankruptcy court lifted the automatic stay and allowed Banc One to proceed with foreclosure in state court. On July 29, 1991, following a foreclosure hearing, a Special Master of the Court of Common Pleas found that Banc One was entitled to foreclose. On September 13, 1991, the Stuckeys filed exceptions to the Special Master's report.

In March 1992, the Stuckeys filed another third-party complaint against HUD in the state court action, alleging that HUD should have accepted assignment of their mortgage. On April 1, 1992, HUD

again removed the case to federal district court. On March 3, 1993, HUD moved to dismiss and, alternatively, for summary judgment. On September 28, 1993, following a hearing, the district court ruled from the bench and entered a minute order granting summary judgment to HUD and remanding the foreclosure case to the state court for further action. The Stuckeys now appeal, alleging that HUD erred in determining that they did not meet two of the criteria necessary for reassignment of the mortgage.

II.

The scope of judicial review of agency action by both the district court and this court is governed by the Administrative Procedures Act (APA), 5 U.S.C. § 706(2)(A)(1988). Thus, HUD's decision to deny assignment of the Stuckeys' mortgage should not be

overturned absent a showing that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. In applying this standard, we consider "whether the [HUD] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Furthermore, our review is limited to the administrative record before the HUD decision-maker at the time the challenged decision was made. *Doraiswamy v. Secretary of Labor*, 555 F.2d 832, 840 (D.C. Cir. 1976). Because the action of HUD is discretionary, we should "not substitute [our] judgment for that of the agency." *Duke Power Co. v. United States Nuclear Regulatory Comm'n*, 770 F.2d 386, 389 (4th Cir. 1985). Finally, because

the HUD action in this case constitutes informal agency action, our judicial review is limited to whether the record facts supporting agency action are "adequately adduced and rationally applied." *Anderson v. HUD*, 701 F.2d 112, 115 (10th Cir. 1983).

Pursuant to the statutory national housing goal of "a decent home and a suitable living environment for every American family," 42 U.S.C. § 1441a (1988), HUD operates housing assistance insurance programs through which it insures mortgages on properties owned by low income individuals. *Anderson v. HUD*, 701 F.2d at 113-14. In enacting these housing assistance insurance programs, Congress anticipated that persons requiring government assistance to acquire housing might also have difficulty keeping mortgage payments

current. Thus, Congress authorized HUD to take an assignment of the mortgage from the mortgage, but only if the mortgagor meets certain criteria.

The applicable statute, as codified at 12 U.S.C. § 1715u(b)(1)(1988), specifies that when the Secretary of Housing and Urban Development (Secretary) receives notice of a default on a HUD insured mortgage, he may, "if determined necessary," acquire the mortgage and security therefor upon payment of the insurance benefits in an amount equal to the unpaid balance of the mortgage plus any unpaid mortgage interest. *Id.* The quoted language above reflects the discretionary nature of such a decision by the Secretary. *See Western & Southern Life Ins. Co. v. Smith*, 859 F.2d 407, 410-11 (6th Cir. 1988) ("[I]t is the intent of the committee that

[implementations of the mortgage acquisition program] are discretionary ... and are to be used only in hardship cases involving deserving mortgagors") (quoting Sen. Rep. No. 924, 86th Cong., 1st Sess. 2, *reprinted in* 1959 U.S.C.C.A.N 2844, 2853).

The applicable regulations, promulgated, at 24 C.F.R. § 203.650 (1989), detail six conditions which the defaulting mortgagor must demonstrate in order to qualify for assignment to HUD. The mortgagor bears the burden of proving the six listed conditions to qualify for the assignment of mortgage. *Smith*, 859 F.2d at 411. These regulations provide in relevant part:

(a)The Secretary will accept assignments of mortgages ... in order to avoid foreclosure when the following conditions are met:

(1) The mortgagee has informed the mortgagor that it intends to foreclose the mortgage:

(2) At least three full monthly installments due on the mortgage are unpaid after application of any partial payments which may have been accepted but not yet applied to the mortgage account.

(3) The property is the mortgagor's principal place of residence....

(4) The mortgagor does not own other property subject to a mortgage insured or held by the Secretary....

(5) The mortgagor's default has been caused by circumstances beyond the mortgagor's control which

render the mortgagor unable to correct the delinquency within a reasonable time or make full mortgage payments.

(6) There is a reasonable prospect that the mortgagor will be able to resume full mortgage payments after a period of reduced or suspended payments not exceeding 36 months and will be able to pay the mortgage in full by its maturity date extended, if necessary, by up to ten years.

24 C.F.R. § 203.650(a).

HUD contends that the administrative record supports its decision to deny assignment of the mortgage, and that the district court, therefore, properly granted summary judgment in favor of HUD. The Stuckeys, however, contend that HUD

erred in its determination under the sixth factor that they had no reasonable prospect for resuming mortgage payments after a thirty-six month period of reduced or suspended payments and that they would not be able to pay the mortgage in full by its maturity date, extended if necessary by up to ten years.[1] We disagree.

---

[1] The first four factors are not at issue in the instant appeal. In addition to their arguments regarding the sixth factor, the Stuckeys further argue that the HUD handbook dated March 1991 recognizes that alcohol dependency qualifies as a circumstance beyond the borrowers' control pursuant to factor number five. The district court upheld HUD's determination that the default here was not the result of circumstances beyond the mortgagor's control. Because we find, however, that the district court did not err in granting summary judgment for HUD on the basis that the Stuckeys failed to meet the sixth factor as set forth in the regulations, we need not reach the alternative issue raised by the fifth factor. *See Karsten v. Kaiser Found. Health Plan of Mid-Atl. States, Inc.*, 36 F. 3d 8, 11 (4th Cir. 1994)(discussing the inadvisability of alternate holdings).

Our review of the record reflects that the Stuckeys failed to meet their burden of showing the existence of this sixth factor. In a preliminary letter dated December 29, 1989, HUD responded to the Stuckeys' request that HUD accept assignment of the mortgage:

> There must be a reasonable prospect that you will be able to resume full mortgage payments after a temporary period of reduced or suspended payments, not exceeding 36 months, and that you will be able to pay the mortgage in full by its original maturity date extended, if necessary, by up to 10 years.

From the information you provided on the 92068f, you currently do not have sufficient income to meet your mortgage

payment of $539.00 and your other monthly obligations of $815.37. (You have reported a net monthly income of $1,220.44).

Before we render a final decision you should provide us with the following information:

1. A statement from Mr. Stuckey's employer that states that his job loss was due to no fault of his own.
2. Any other written proof that you may have that shows why you got behind with your mortgage payments.
3. Written proof and/or documentation that shows any anticipated increase in earnings and/or income you expect to receive; the date you anticipate receiving the

increase in income; the dollar amount of income you anticipate receiving, and the source of the earnings and/or income.

(J.A. at 143.) HUD then allowed the Stuckeys an opportunity to proffer further information supporting the criteria for assignment of their mortgage. At or prior to a meeting held on January 24, 1990, the Stuckeys submitted several documents upon which HUD relied in reaching its decision.[2] HUD also considered the Stuckey's oral representations supported by later

---

[2] These included: (1) a letter from Mr. Stuckey's former employer, William C. Barnes, Sheriff of Florence County, South Carolina; (2) a letter from Dr. Lloyd Miller, Mr. Stuckey's doctor; (3) an award of supplemental security income from the Social Security Administration; (4) a HUD Request for Financial Information Form 92068F; and, (5) a printout of the Stuckeys' loan history and HUD form 92206 from Banc one Mortgage Corporation.

submissions.[3] By letter dated June 1, 1989, HUD denied the Stuckeys' request for assignment of the mortgage.[4] The

---

[3] These later submissions included: (1) a letter from Wilson Player dated February 1, 1990, verifying Mr. Stuckey's part-time employment; (2) Three income statements from Hemingway Apparel Mfg., Inc., totalling $267.50; and, (3) a check stub from Colonial Rubber Works, Inc. reflecting an after-tax payment of $231.77

[4] The June 1, 1989 HUD letter stated in relevant part:

> We have carefully reviewed both the information you gave us at our meeting and all other documents given to us. Unfortunately, our review shows that your case did not meet all the standards for assignment.
>
> ***
>
> (3.) No written proof was presented to show that Mr. Stuckey has anticipated receiving any increase in income and/or earnings. The Supplemental Security Benefits awarded Charnissa Stuckey, a 15-year old minor child, as indicated in the letter, is for the well-being of the child, and not for household income expenses.
>
> There must be a reasonable prospect that you will be able to resume full mortgage payments after a temporary period of reduced or suspended payments, not

district court, in its review of the record before HUD, reached a similar result. Our independent review of the record reflects that Charles Stuckey's employment was sporadic in 1988 and 1989; his earnings totalled $231.77 for 1988 and $267.50 for 1989. This factor, in conjunction with Corine Stuckey's limited monthly income, raised no reasonable prospect that the Stuckeys would be able to resume full mortgage payments after a temporary period of reduced payments. Furthermore, the record in he proceedings

---

exceeding 36 months, and that you will be able to pay the mortgage in full by its original maturity date extended, if necessary, by up to 10 years.

From the information you presented at the Appeal Conference and on the 92068f form, you do not have sufficient income, (legally useable) that would assist you in meeting your mortgage obligation of $539.00 and your other monthly obligations of $815.37

(J.A. at 110-11.)

below, both before HUD and the district court, reflects that the facts were adequately adduced and the law rationally applied in reaching this conclusion. *Anderson*, 701 F.2d at 115. Even if we were to disagree with the result obtained by the agency and sustained by the court below, we may not substitute our judgment for that of the agency.[5] *Duke Power*, 770 F.2d at 389-90. Given our independent review of the record, however, we agree with the findings of HUD and the district court.

---

[5] The parties spent much time at oral argument discussing the current financial circumstances of the Stuckey family and that Ms. Stuckey had saved a substantial sum because her family had resided at the property in question during the pendency of this litigation without making mortgage payments. However, no rule or regulation gives this court the authority to go beyond the administrative record before HUD at the time it decided this case or to deviate from our deferential standard of review.

III.

Thus, we conclude that the district court correctly held that the administrative record supported HUD's conclusion that the Stuckeys had no reasonable prospect for resuming mortgage payments after a temporary period of reduced r suspended payments and would not be able to pay the mortgage in full by its maturity date, even with a ten-year extension. We, therefore, affirm the decision of the district court.

AFFIRMED

IN THE
UNITED STATES COURT OF APPEALS

for the FOURTH CIRCUIT

Record No. 93-2519

BANC ONE MORTGAGE CORPORATION,

Plaintiff,

v.

CHARLES A. STUCKEY; CORINE STUCKEY,

Defendants - Third Party

Plaintiffs - Appellants,

v.

JACK KEMP,

Secretary of the United States Department of Housing and Urban Development, et al.,

Third Party Defendants - Appellees.

PETITION FOR REHEARING

Charles A. Stuckey and Corine Stuckey, the appellants above named, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, present this petition for a rehearing in the above entitled cause and, in support thereof, respectfully shows:

1. The Court, in its opinion affirming the District Court's ruling, herein entered on January 25, 1995, has clearly failed to apply the standard that HUD's denial of the Stuckeys' mortgage assignment should be overturned if there is a showing that the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The administrative record here clearly shows the arbitrary and capricious nature of HUD's decision to deny assignment of the Stuckeys' mortgage.

2. The administrative record clearly shows that HUD never evaluated or considered a reduced or suspended mortgage payment for the Stuckeys, as criterion six mandates, in order to determine whether the Stuckeys would have been able to resume full mortgage payments at least by the 36th month after the assignment was granted.

3. The administrative record clearly shows that HUD required the Stuckeys to establish a present ability to resume full mortgage payments, instead of a future ability to pay as the regulations mandate.

4. The administrative record clearly shows that HUD did not consider that $193.00 (one hundred ninety three dollars and 00/100), which was then allocated for a car payment, would have been available in 24 months to be used

for the mortgage payments.

5. The administrative record clearly shows that HUD never considered that the $386.00 (three hundred eighty six dollars and 00/100) of Supplemental Security Income (SSI) paid to a 15 year-old, would have been paid to an adult and usable as a contribution to the mortgage payments following temporary or reduced payments but prior to the 36th month after the assignment was granted.

6. Even though this court elected not to decide the circumstance criteria, the very factors it relies upon for affirming the District Court's ruling on the reasonable prospect criterion are indicative of the disease of alcoholism. In a case of chemical dependency, the circumstance and reasonable prospect criteria are closely connected and even overlapping. Based on this close

connection, there is evidence in the record that HUD's decision to deny the assignment was not adequately adduced or rationally applied.

First, while this court is not empowered to substitute its judgment for that of the agency, an agency's rule would be arbitrary and capricious if the agency entirely failed to consider an important aspect of the problem. *See Motor Vehicle Mfg. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29 (1983). HUD clearly failed to consider whether the Stuckeys could have resumed full mortgage payments after a period of temporary or suspended payments. Further, HUD failed to consider the resources the Stuckeys would have available to them to resume payments after a period of temporary or suspended payments.

Second, the administrative record did establish that the Stuckeys had a reasonable prospect for resuming mortgage payments after a period of temporary or suspended payments. The regulations regarding criterion six clearly state that before HUD will accept assignment of a mortgage, there must be a reasonable prospect that a homeowner will be able to resume full mortgage payments after a temporary period of reduced or suspended payments not exceeding 36 months and will be able to pay the mortgage in full by its maturity date extended, if necessary, by up to ten years. [emphasis added] 12 U.S.C.A. @ 1715u (1989), 24 C.F.R. 203.650. The court in *In re Armstead*, 97 B.R. 798 (Bankr. E. D. Pa. 1989) held that the HUD regulations require only that the mortgagor show a reasonable prospect for resuming mortgage payments,

and not an almost certain prospect of doing so. This clearly is a low threshold showing.

The Stuckeys reported a net monthly income of $1,220.44 (one thousand two hundred twenty dollars and 44/100). In HUD's final determination letter of January 31, 1990, the agency concluded that the Stuckeys did not have sufficient, legally usable income to cover the full mortgage obligation and other monthly obligations. [emphasis added]

The administrative record shows that the full monthly mortgage obligation and other monthly payments totalled $1,354.37 (one thousand three hundred fifty four dollars and 37/100). The net monthly income the couple reported was short by $133.93 (one hundred thirty three dollars and 93/100) to cover all of their

obligations. According to HUD's analysis, this family was short approximately $135.00 (one hundred thirty five dollars and 00/100) from making all of its monthly obligations and keeping a roof over their heads. HUD clearly did not look at a reduced mortgage payment or a temporarily suspended payment until the family could recover from its financial situation.

No where in the administrative record is it established that HUD factored in temporarily suspended payments or reduced payments and compared that with the Stuckeys' net monthly income of $1,220.44 (one thousand two hundred twenty dollars and 44/100). HUD's letter of December 29, 1989 specifically refers to **the full mortgage payment** and clearly did not consider a reduced or suspended payment. [emphasis

added] HUD's January 31, 1990 letter mirrors that same arbitrary conclusion since the agency never considered reduced or suspended payments.

Third, the regulations provide that in evaluating the reasonable prospect criterion, future ability to pay is the appropriate key. *Cronkhite v. Kemp*, 741 F. Supp. 828 (1990). Ineligibility is not determined simply because the homeowner has a lack of income at the time the assignment request is made.

In the December 29, 1989 letter from HUD responding to the Stuckey's request that HUD accept the assignment, the agency wrote that the Stuckeys "currently do not have sufficient income to meet your mortgage payment of $539.00 and your other monthly obligations of $815.37." [emphasis added] HUD then requested additional information documenting any

anticipated increase in earnings and/or income and the date and source of such income.

The regulations further provide that a mortgagor must provide sufficient information for the agency's staff to assess future ability to repay, and eligibility cannot be denied based on the lack of a specific piece of documentation not provided by the mortgagor. HUD HANDBOOK 4330.2 REV-1, 2-10, B, 3. (See Brief Addendum, p.30).

This court concluded that based on the administrative record, Mr. Stuckey's employment was sporadic in 1988 and 1989 and his earnings were very limited. This, as HUD concluded, coupled with Ms. Stuckey's limited income, established that the couple had no reasonable prospect for resuming full mortgage payments after a temporary period of

reduced payments. No where in the record did HUD consider anything less than the full mortgage payment of $539.00 (five hundred thirty nine dollars and 00/100). Ms. Stuckey informed HUD that she reduced all of her debts except the car payment. HUD's decision that the Stuckeys did not have a reasonable prospect for resuming full mortgage payments would have been correct only if the couple was totally unable to work and earn an income in the future.

Fourth, HUD overlooked the fact that the car loan would have been paid off in a 24 month period. This would have allowed $193.00 (one hundred ninety three dollars and 00/100) to be used for the mortgage payments. HUD did not factor in the availability of these funds into the reasonable prospect equation. If the Stuckeys were short approximately $135.00

(one hundred thirty five dollars and 00/100) from making the full mortgage payment when the assignment request was made, within 24 months, $193.00 (one hundred ninety three dollars and 00/100) would have been available to pay on the mortgage. This alone clearly established that the Stuckeys had a reasonable prospect for resuming full mortgage payments in the future.

Fifth, HUD concluded that $386.00 (three hundred eighty six dollars and 00/100) of Supplemental Security Income (SSI) could not be "legally" used for the mortgage payment. However, the regulations clearly provide that the field staff must consider benefits that reduce expenses. HUD HANDBOOK 4330.2 REV-1, 2-10, B, 4(a). Neither the handbook nor the regulations exclude consideration of SSI payments to children

in assessing the reasonable prospect criterion.

The SSI payment clearly could have been used to reduce monthly expenses such as food and clothing for the child, thus making more funds available for the mortgage payment. The Stuckeys indicated that $200.00 (two hundred dollars and 00/100) was spent per month for food. In addition, $60.00 (sixty dollars and 00/100) was spent per month for clothing. A portion of the $260.00 (two hundred sixty dollars and 00/100) mentioned above could have been used towards the mortgage payments while a portion of the $386 (three hundred eighty six dollars and 00/100) could have been used towards expenses for the child.

Even if excluded at the time of the assignment request, the SSI payments in this case should have been considered as

future income for mortgage payment assistance, due to the child reaching the age of majority during the period allowed for suspended or reduced payments. Once the child reached majority, the $386.00 (three hundred eighty six dollars and 00/100) could have counted for household income. If no consideration was given to the SSI, the Stuckeys still had a reasonable prospect for resuming full mortgage payments based on the available funds from the car payment.

Finally, since the agency arbitrarily concluded that alcoholism was not recognized as a disease, it incorrectly analyzed the Stuckeys' prospects for future payment utilizing the wrong factors. Here, HUD focused on Mr. Stuckey's sporadic work history and did not consider that Mr. Stuckey had a very favorable prospect for getting well,

since a doctor informed that Mr. Stuckey was off "alcohol". In addition, HUD wrongfully determined that Mr. Stuckey did not have the ability to become fully employed in the future.

The handbook lists poor work attendance or continued unemployment as examples of the kind of evidence which must exist in order to confirm the mortgagor's claim that criterion five had been met in a chemical dependency case. HUD HANDBOOK 4330.2 REV-1, 2-9, B, 2a(2)(Appellants' Brief Addendum, p.28).

Thus, in a chemical dependency case, it is not possible to correctly analyze whether criterion six had been met where there has been an arbitrary and capricious determination that the chemical dependency was not recognized. This is especially true where a sporadic employment history is a factor in denying

the assignment request under the reasonable prospect criterion.

HUD's decision not to accept the Stuckeys' request for assignment was clearly arbitrary and capricious and not in accordance with law since:

1) HUD did not evaluate the Stuckeys' ability to resume mortgage payments after a period of reduced or suspended payments;

2) HUD did not consider the Stuckeys' future ability to pay, but rather, required the establishment of a present ability to pay;

3) HUD did not factor in the availability of the $193.00 (one hundred ninety three dollars and 00/100) in 24 months once the car was paid off;

4) HUD did not consider the availability of the SSI to reduce expenses for the child during the period

of suspended or reduced payments, thus freeing more funds for household expenses; and

5) HUD did not consider that after the period of suspended or reduced payments, the SSI would have been paid to an adult and usable as a contribution to the mortgage payments.

WHEREFORE, for the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that judgment of the District Court be reversed and this matter be remanded to the agency for acceptance of the assignment.

Respectfully submitted,

By: /s/ Alvin Hinkle
Alvin Hinkle
Counsel for Appellants
CAROLINA REGIONAL LEGAL
SERVICES CORPORATION

279 West Evans Street
Post Office Box 479
Florence, South Carolina 29503
(803) 667-1896

Florence, South Carolina
March 8, 1995